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7 **IN THE UNITED STATES DISTRICT COURT**
8
9 **FOR THE DISTRICT OF ARIZONA**

10 United States of America,
11 v.
12 Isaias Delgado,
13 Defendant.

14 No. CR-19-01094-001-TUC-JGZ (JR)

ORDER

15 Pending before the Court are Defendant Isaias Delgado's Motion to Limit Forfeiture
16 Amount to Profits (Doc. 216); Motion for Release of Property (Doc. 217); Motion to Stay
17 (Doc. 223); and Motion to Assign and Designate (Doc. 224). Delgado's Motion to Limit
18 Forfeiture Amount to Profits and Motion for Release of Property are fully briefed. (Docs.
19 216–22.) The government filed a response to Delgado's Motion to Stay. (Doc. 227.) For
20 the following reasons, the Court will deny Delgado's Motion to Limit Forfeiture Amount
21 to Profits; grant in part and deny in part his Motion for Release of Property; grant his
22 Motion to Stay; and deny his Motion to Assign and Designate.

23 **I. Background**

24 In April 2019, Delgado was charged by Indictment with one count of willfully
25 engaging in the business of dealing firearms, in violation of 18 U.S.C. § 922(a)(1)(A) and
26 924(a)(1)(D), and three counts of making false statements in the records of federal firearms
27 licensees. (Doc. 13 at 1–2; Doc. 124.) The Indictment included a forfeiture allegation,
28 stating the government's intention, upon conviction, to forfeit any firearms involved in the

1 commission of the offenses, pursuant to 18 U.S.C. § 924(d) and 28 U.S.C. § 2461(c). (Doc.
2 13 at 3.) The forfeiture allegation also stated that if any of the property sought to be
3 forfeited could not be located despite due diligence, or was transferred or sold to a third
4 party, or placed outside of the jurisdiction of the court, the government would seek
5 forfeiture of any of Delgado's other property up to the value of the forfeitable property,
6 pursuant to 21 U.S.C. § 853(p). (*Id.*)

7 Trial was set for August 2021. Before trial, Delgado waived his right to try the
8 forfeiture allegation to a jury, (Doc. 123), and the government moved to dismiss the three
9 counts of making false statements, (Doc. 124). After a four-day trial, the jury found
10 Delgado guilty of the remaining charge: willfully engaging in the business of dealing
11 firearms. (Doc. 143.) The same day, the Court held a forfeiture hearing. (Doc. 146.)

12 After the forfeiture hearing, the Court issued a Preliminary Order of Forfeiture,
13 setting forth five findings relating to the twenty-five firearms the government had shown
14 were purchased by Delgado. (Doc. 147; Trial Exhibit 77.) First, the Court found that the
15 twenty-five firearms—nine of which were seized from Delgado and sixteen of which were
16 unrecovered—represented property involved in Delgado's violation of 18 U.S.C. §
17 922(a)(1)(A) and 924(a)(1)(D). (*Id.* at 1–3.) Second, Delgado had an interest in these
18 firearms and the government established the requisite nexus between the firearms and the
19 criminal offense. (*Id.* at 3.) Third, by clear and convincing evidence, Delgado knowingly
20 violated 18 U.S.C. § 922(a)(1)(A) and 924(a)(1)(D). (*Id.*) Fourth, the government may seek
21 substitute forfeiture under 21 U.S.C. § 853(p) as to the sixteen unrecovered firearms
22 because the government proved by a preponderance of the evidence that Delgado placed
23 those firearms beyond the Court's jurisdiction or transferred, sold to, or deposited them
24 with a third party. (*Id.*) Fifth, the government established by a preponderance of the
25 evidence that the sixteen unrecovered firearms had a value of \$43,521.85. (*Id.*) The value
26 of each firearm was established by its purchase price. (*Id.*)

27 After ensuring the government followed the notice requirements of Rule 32.2(b)(6)
28 of the Federal Rules of Criminal Procedure, the Court entered a Final Order of Forfeiture.

1 (Doc. 204.) The Court directed that Delgado forfeit to the government all right, title, and
 2 interest in the nine seized firearms pursuant to 18 U.S.C. § 924(d) and 28 U.S.C. § 2461(c).
 3 (*Id.* at 3.) The Court also permitted the government to seek, as a substitute asset, forfeiture
 4 of any of Delgado's property up to \$43,521.85, pursuant to 18 U.S.C. § 924(d), 28 U.S.C.
 5 § 2461(c), and 21 U.S.C. § 853. (*Id.* at 4.)

6 **II. Motion to Limit Forfeiture Amount**

7 Delgado requests that the Court limit the forfeiture of substitute assets to the amount
 8 of profits Delgado received from selling the unrecovered firearms, rather than allowing
 9 recovery of the value of the firearms. (Doc. 216 at 9.) Delgado argues that the profits
 10 amounted to just \$1,500. (*Id.*) To support this request, Delgado presents two arguments:
 11 the government may recover only proceeds, not the fair market value, of any firearm not
 12 seized; and the Court's forfeiture determinations violated his Sixth Amendment right to a
 13 trial by jury. (Doc. 216 at 2; Doc. 220 at 2.) The Court will deny Delgado's motion because
 14 these arguments have no basis in the law or the record.

15 Taken together, three statutes allow the government to seek substitute forfeiture for
 16 the full value of the sixteen unrecovered firearms. First, 18 U.S.C. § 924(d) permits the
 17 civil forfeiture of firearms and ammunition involved in any knowing violation of any
 18 criminal law of the United States, where such intent is shown by clear and convincing
 19 evidence. *See United States v. Valdez*, 911 F.3d 960, 963 (9th Cir. 2018). This Court
 20 determined by clear and convincing evidence that Delgado knowingly violated 18 U.S.C.
 21 § 922(a)(1)(A) and 924(a)(1)(D). (Doc. 147 at 1–3.) The Court also determined that the
 22 sixteen unrecovered firearms were involved in Delgado's criminal violation. (Doc. 147
 23 at 3.)

24 Second, 28 U.S.C. § 2461(c) authorizes the use of the criminal forfeiture procedures
 25 of 21 U.S.C. § 853 whenever a defendant is found guilty of a crime and civil forfeiture is
 26 available. *See Valdez*, 911 F.3d at 964–66. The jury found Delgado guilty. (Doc. 143.) As
 27 discussed above, civil forfeiture is available for Delgado's criminal violation.

28 Third, 21 U.S.C. § 853(p) allows the forfeiture of substitute property in certain

1 situations, including when the defendant's actions made the forfeitable property
 2 unavailable. *See Valdez*, 911 F.3d at 963, 966–67. This Court determined that Delgado's
 3 acts or omissions resulted in the sixteen firearms being placed beyond the Court's
 4 jurisdiction or transferred, sold to, or deposited with a third party. (Doc. 147 at 3.) The
 5 Court therefore determined, pursuant to § 853(p), that the government may seek forfeiture
 6 of Delgado's substitute property. (*Id.*)

7 Delgado's argument that a provision of the third statute, § 853(a), limits forfeitable
 8 property to "proceeds" was rejected by the Ninth Circuit in *Valdez*. The relevant statutes
 9 permitting the forfeiture of firearms, § 924(d) and § 2461(c), employ only the procedural
 10 provisions of § 853, such as § 853(p). *Valdez*, 911 F.3d at 966–67. The substantive
 11 provision of § 853(a), which may limit forfeitable property to proceeds, is thus irrelevant
 12 here. *Id.*

13 Delgado's argument that the Court's forfeiture determinations violated his Sixth
 14 Amendment right to a jury trial also fails. Delgado points to the fact that the Court, not the
 15 jury, determined which firearms were involved in the offense and subject to forfeiture.
 16 (Doc. 220 at 1–2.) Delgado argues that the jury must determine any facts related to
 17 forfeiture. (Doc. 220 at 1–2.) In support, Delgado cites *Apprendi v. New Jersey*, 530 U.S.
 18 466 (2000) and *Southern Union Co. v. United States*, 567 U.S. 343 (2012). Under *Apprendi*,
 19 "any fact [other than a prior conviction] that increases the penalty for a crime beyond the
 20 prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable
 21 doubt." 530 U.S. at 490. In *Southern Union*, the Supreme Court extended the holding in
 22 *Apprendi* to the determination of the amount of criminal fines, requiring that juries
 23 determine facts that set a fine's maximum amount. 567 U.S. at 353–58. Delgado argues
 24 that *Southern Union* is applicable here because substitute forfeiture is no different than a
 25 criminal fine. (See Doc. 220 at 2.)

26 The Supreme Court, however, has also held that there is no constitutional "right to
 27 a jury verdict on forfeitability" in a criminal forfeiture proceeding. *Libretti v. United States*,
 28 516 U.S. 29, 49 (1995). Contrary to Delgado's argument, *Libretti* remains binding

1 precedent. *See United States v. Phillips*, 704 F.3d 754, 769 (9th Cir. 2012) (“Because
 2 *Libretti* has direct application in this case, we are bound by its holding even if it might
 3 appear ‘to rest on reasons rejected in some other line of decisions.’”). Under *Libretti*, jury
 4 findings of fact were not required for Delgado’s criminal forfeiture proceedings. *See*
 5 *Libretti*, 516 U.S. at 49.

6 Even so, Rule 32.2(b)(5) of the Federal Rules of Criminal Procedure permits
 7 defendants to request a jury trial for the issue of forfeiture. Delgado, however, waived this
 8 statutory right. (Doc. 123.) When the Court questioned Delgado about waiver on August 2,
 9 2021, Delgado confirmed he consulted with counsel, signed the waiver form, and did not
 10 want a jury trial for the issue of forfeiture. Delgado’s waiver of his statutory right to a jury
 11 determination on forfeiture was plainly adequate.

12 For these reasons, the Court will deny Delgado’s Motion to Limit Forfeiture
 13 Amount.

14 **III. Motion for Release of Property**

15 Delgado requests that the Court direct the government to release all of his property
 16 not listed in the Final Order of Forfeiture. (Doc. 217 at 1.) This property includes mail,
 17 photographs, books, discs, credit and debit cards, USB drives, memory cards, cellphones,
 18 ammunition, and firearm accessories. (*Id.* at 1–2.)

19 In its Response, the government states it does not object to the release of any items
 20 listed in Delgado’s Motion except for any firearm-related items. (Doc. 219 at 1.) The
 21 government specifically objects to the release of ammunition, ammunition cases, firearm
 22 cases, firearm boxes, firearm accessories, firearm magazines, and firearm barrels because
 23 (1) the items are forfeitable as instrumentalities of a crime; (2) some of the items have
 24 significant value and could be applied towards Delgado’s monetary forfeiture judgment;
 25 and (3) the items are evidence of Delgado’s crime which the government must retain while
 26 his appeal is pending. (*Id.* at 1–2.) Delgado contends the government must release the
 27 firearm-related items because they were neither involved in the offense nor presented as
 28 evidence at trial, and it is improper for the government to apply these items towards a

1 judgment without due process. (Doc. 222 at 1–2.)

2 The Court will grant Delgado’s motion in part and deny it in part, and will direct the
 3 government to release all of Delgado’s property not listed in the Final Order of Forfeiture
 4 except for any firearm-related items because those items are evidence of Delgado willfully
 5 engaging in the business of dealing firearms. To prevail on a motion for return of property,
 6 Delgado must demonstrate that (1) he is entitled to lawful possession of the seized property;
 7 (2) the property is not contraband; and (3) either the seizure was illegal or the government’s
 8 need for the property as evidence has ended. *United States v. Van Cauwenberghe*, 827 F.2d
 9 424, 433 (9th Cir. 1987). Delgado has established the first two elements as to all of the
 10 property: Delgado is entitled to the lawful possession of his personal property and the
 11 property is not contraband.¹ However, Delgado has failed to show that the government no
 12 longer needs the firearm-related items as evidence.

13 The government’s need for the firearm-related items as evidence has not ended
 14 because Delgado’s appeal is pending. *See, e.g., United States v. Saunders*, 957 F.2d 1488,
 15 1495 (8th Cir. 1992) (“The motion for the return of [property], even [property] not
 16 introduced at trial, was premature because defendant’s direct appeal was still pending.”).
 17 Further, the firearm-related accessories and ammunition, by their very nature, are closely
 18 related to the business of dealing firearms. It would therefore not be unreasonable for the
 19 government to seek to admit these items into evidence if Delgado’s case were retried.²

20 ¹ The government does not contend that Delgado’s firearm-related property is contraband.
 21 (*See* Doc. 219.) Delgado also does not argue that the government illegally seized the
 22 firearm-related property. (*See* Docs. 217, 222.)

23 ² The Court rejects the government’s argument that it may retain Delgado’s firearm-related
 24 property as forfeitable instruments of Delgado’s crime and property that will be subject to
 25 the money forfeiture judgment. (Doc. 219 at 1–2.) The government may not take title to
 26 Delgado’s personal property without the proper proceedings, which it has not initiated. *See,*
 27 *e.g., United States v. Wilson*, 540 F.2d 1100, 1104 (D.C. Cir. 1976) (“It goes without
 28 saying, that if the Government seeks to forfeit the property a proper proceeding should be
 29 instigated to accomplish that purpose. . . . A claim by the owner for the return of his
 30 property cannot be successfully resisted by asserting that the property is subject to
 31 forfeiture.”); *United States v. Hurtado*, No. CV 09-4206 SVW (EX), 2009 WL 10671968,
 32 at *7 (C.D. Cal. Oct. 7, 2009) (citing *Wilson* and finding that the district court had
 33 jurisdiction “to return property to the movant after the government’s need for it ends”).
 34 Similarly, the government cannot hold Delgado’s firearm-related property by merely
 35 asserting the property will be subject to the money forfeiture judgment. The government
 36 must initiate the proper proceedings to accomplish that purpose. *See Wilson*, 540 F.2d at

1 For these reasons, the Court will grant in part and deny in part Delgado's Motion
2 for Release of Property.

3 **IV. Motion to Stay**

4 Delgado requests the Court stay its August 23, 2022 Final Order of Forfeiture
5 pending the outcome of his appeal. (Doc. 223.) In its Response, the government stated that
6 the items forfeited have not been disposed and that it has no objection to Delgado's Motion.
7 (Doc. 227.) The Court will therefore grant Delgado's Motion to Stay.

8 **V. Motion to Assign and Designate**

9 In his Motion to Assign and Designate, Delgado requests he "be granted and
10 afforded access to the CM ECF and PACER systems" and provides an email with which
11 he intends to access these systems. (Doc. 224.) To the extent that Delgado requests that the
12 Court direct the Bureau of Prisons to provide him with access to the CM ECF and PACER
13 systems, Delgado's Motion will be denied. However, the Court will send courtesy copy
14 notices of its Orders to Delgado's email address and Delgado may use this Order to
15 demonstrate he has an active case requiring access to his correctional facility's library or
16 legal resources.

17 **VI. Conclusion**

18 Accordingly,

19 **IT IS ORDERED:**

20 1. Delgado's Motion to Limit Forfeiture Amount to Profits (Doc. 216) is
21 **denied.**

22 2. Delgado's Motion for Release of Property (Doc. 217) is **granted in part** and
23 **denied in part.**

24 3. Delgado's Motion to Stay (Doc. 223) is **granted**. The Final Order of
25 Forfeiture (Doc. 204) is **stayed** pending resolution of Delgado's appeal.

26 4. Delgado's Motion to Assign and Designate (Doc. 224) is **denied**.

27 5. Within 30 days from the date of this Order, the government shall release to

28 1104.

1 Yadira Delgado all of Delgado's personal property not listed in the Final Order of
2 Forfeiture except for any firearm-related items such as ammunition, ammunition cases,
3 firearm cases, firearm boxes, firearm accessories, firearm magazines, and firearm barrels.

4 6. The Clerk of Court shall mail a copy of this Order to pro se Defendant
5 Delgado and email an ad hoc notice of filing to id-vs.usa@gmail.com.

6 Dated this 4th day of April, 2023.

Jennifer G. Zipts
Honorable Jennifer G. Zipts
United States District Judge